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No. 85-1445

Supreme Court, U.S.
FILED
MAR 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida corporation,

*Petitioners,*

v.

PACCAR, INC., a Delaware corporation,

*Respondent.*

**On Petition for A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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March 26, 1986

CASILLAS PRESS INC. - 1717 K ST NW WASHINGTON DC - 223-1220

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## QUESTIONS PRESENTED

I. Was the application of the new trial standard for review on appeal a clear departure from the accepted and usual course of judicial proceedings?

II. Is the decision of the United States Court of Appeals for the Eleventh Circuit in this case in direct conflict with decisions of this Court or other Courts of Appeals on controlling issues of law?

## RULE 28.1 DISCLOSURE

The following is a list of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of the respondent, PACCAR, Inc. This representation is made pursuant to Rule 28.1 of this Court:

Peterbilt Motors Company, Peterbilt of Canada, Kenworth Truck Company, Kenworth Trucks Pty. Limited, Canadian Kenworth Company, Dart Truck Company, PACCAR Financial Corp., PACCAR Financial Services Limited, PACCAR International, Inc., PACCAR of Canada Limited, PACCAR Parts Division, Pacific Car and Foundry Company, Truck Acceptance Corporation, International Car Company, Braden Winch Co., Gearmatic Co., Wagner Mining Equipment Co., Kenworth Mexicana, S.A. de C.V., Fodens Limited.

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   B. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE ORDER GRANTING A NEW TRIAL AND JUDGMENT NOV.

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JAMES E. DEAS and PETERBILT OF FLORIDA, INC., a Florida corporation,

*Petitioners,*

v.

PACCAR, INC., a Delaware corporation,

*Respondent.*

**On Petition for A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PACCAR, INC. ("PACCAR"), the respondent, submits this brief in opposition to the Petition For A Writ of Certiorari. PACCAR accepts the petitioners' assertions under the headings of Opinion Below, Statement of Jurisdiction, and Statutory Provisions Involved. PACCAR does challenge the petitioners' Questions Presented and Statement of the Case, which do not accurately present the issues in this case or the reasons for the decisions below.

## STATEMENT OF THE CASE

This is an appeal from an order granting PACCAR a new trial, which was immediately reviewed through the

vehicle of an invited judgment notwithstanding the verdict ("JNOV").[1]

PACCAR's Peterbilt Motors Company division is a manufacturer of heavy duty trucks. James E. Deas ("Deas") was the President and sole shareholder of Peterbilt of Florida, Inc. ("POF"), formerly a Peterbilt truck dealer. Deas and POF sued PACCAR for: (1) violation of the Federal and Florida Dealers Day in Court Acts[2]; (2) fraud with respect to the nondisclosure of facts regarding prospective loans, supplies of new trucks, and POF's status as a dealer; and (3) tortious interference with POF's and Deas' business relationships.

The case was submitted to the jury only on POF's claims that PACCAR violated the Federal and Florida Dealers Acts and the claim by Deas that PACCAR tortiously interfered with a prospective business relationship. The jury returned a verdict in favor of POF and Deas on these claims, and a judgment was entered on POF's Florida Dealers Act claim and on Deas' tortious interference claim.

PACCAR moved for a JNOV and alternatively for a new trial. The United States District Court for the Middle District of Florida (Young, Sr. J.) initially denied PACCAR's motion for a JNOV, but ordered a new trial (1a, 3a-10a).[3] PACCAR's motion for a new trial was granted for several reasons, i.e.:

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[1]Ordinarily, a new trial order is interlocutory and not immediately appealable. 28 U.S.C. § 1291 (1982); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980).

[2]15 U.S.C. §§ 1221, 1222 (1982); Fla. Stat. §§ 320.60-320.70 (1979).

[3]The reference ("____"a) is to the Appendix to this Brief in Opposition.

1. The admission of the testimony of POF's expert, as support for both liability and damages, was erroneous because the testimony was "completely speculative" (1a, 6a-8a, 10a).[4]

2. The failure to have given a proper instruction concerning the burden of proof under the Florida Dealers Act was erroneous (8a, 9a).

3. POF failed to provide sufficient evidence to prove discrimination by PACCAR in the delivery or allocation of trucks (6a-8a).

4. The contention by PACCAR that it failed to renew POF's dealership because POF had not arranged for floor plan financing was "undisputed, uncontroverted." (8a).

5. There was no substantial evidence to prove proximate cause and damages to support Deas' tortious interference claim (9a, 10a).

POF and Deas then moved, pursuant to Fed.R.Civ.P 60(b), for a JNOV in PACCAR's favor (13a). The purpose of the JNOV was to permit POF and Deas to take an immediate appeal of the order granting a new trial.[5] POF and Deas stated that they could not establish any better case on retrial and that they could not afford a new trial. They thus wanted to win or lose based on the record made at trial, including the testimony of their expert, which, under the District Court's ruling, was inadmissible. 775

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[4]Petitioners' statement at page 4 of their Petition that "the order gave no other basis for granting the new trial" is incorrect since the order expressly incorporates "the reasons stated from the bench at the conclusion of the aforesaid hearing." In its oral ruling, the court discussed the other reasons listed in 2 through 5 above (3a-10a, referenced in written Order 1a).

[5]775 F.2d at 1502, 1503 (50a-52a).

F.2d at 1499 (43a). Consequently, the District Court granted the Rule 60(b) motion, entered a JNOV for PACCAR and alternatively ordered a new trial (36a).

In their memorandum and argument in support of the Rule 60(b) motion, POF and Deas acknowledged that the new trial order was based on the erroneous admission of their expert's testimony and not solely because of the insufficiency of their evidence (17a). At the Rule 60(b) motion argument, the District Court made it clear that the new trial had been granted "for a number of reasons" (which had been announced from the bench at the time the new trial was ordered) (3a-10a, 28a).

Nevertheless, in their Petition to this Court, POF and Deas have characterized the District Court's order granting a new trial, saying that it "was clearly based on his view as to the weight of the evidence." (Petition, page 14). This statement is contrary to the record and the trial judge's rulings from the bench and order that the new trial was granted "for a number of reasons" (28a). The petitioners' mischaracterization was expressly rejected by the United States Court of Appeals for the Eleventh Circuit, i.e.:

> In this case it is clear that the trial court granted a new trial for several reasons.
>
> * * *
>
> After reviewing the thrust of the district court's order, it is obvious that the new trial was not ordered solely because the jury verdict was against the clear weight of the evidence. This is a case where a combination of factors, which could have caused the jury to reach a possible erroneous verdict, led the court to conclude that a new trial was necessary. Under these circumstances, the district court was allowed wide dis-

cretion in granting the new trial. 775 F.2d at 1504, 1505 (55a, 57a).

The Eleventh Circuit allowed POF and Deas to consent to the grant of a JNOV as a vehicle by which to obtain an immediate appeal of the interlocutory new trial order. 775 F.2d at 1503 (52a, 53a). The Eleventh Circuit applied the new trial standard of review and held that the District Court did not abuse its discretion in granting a new trial. 775 F.2d at 1503, 1508 (53a, 64a). Specifically, the Eleventh Circuit ruled that: (1) the District Court did not abuse its discretion when it granted a new trial due to its failure to have instructed the jury on the burden of proof under the Florida Dealers Act. *International Harvester Company v. Calvin,* 353 So.2d 144 (Fla. 1st DCA 1977); 775 F.2d at 1505, 1506 (57a-59a); (2) POF's evidence of alleged discrimination in delivery time and allocation of new trucks was "inherently speculative" and "deficient"; 775 F.2d at 1506, 1508 (60a, 64a); and (3) "POF's evidence was speculative, both substantively and as to causation." 775 F.2d at 1508 (64a).[6] Furthermore, the Eleventh Circuit held that POF and Deas were entitled to a new trial, but waived that right to obtain an immediate appeal. The JNOV in PACCAR's favor was therefore affirmed. 775 F.2d at 1508 (64a, 65a).[7]

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[6]The Eleventh Circuit decision is based on its independent review of the record which exceeded 3,400 pages.

[7]The petitioners' Statement of the Case, at pages 2 and 3, makes an erroneous reference to the record regarding PACCAR's alleged promises to provide financial assistance and an adequate supply of new trucks. This evidence was ruled inadmissible and was excluded by a pretrial order in limine (11a) except as to the petitioners' fraud claim, on which a verdict was directed for PACCAR (42a). Neither the order in limine nor the directed verdict was appealed.

## REASONS FOR DENYING THE WRIT

### I. THE ELEVENTH CIRCUIT'S NEW TRIAL STANDARD OF REVIEW WAS CORRECT.

#### A. THE JNOV WAS MERELY A VEHICLE TO OBTAIN IMMEDIATE REVIEW OF THE NEW TRIAL ORDER AFTER PETITIONERS WAIVED THEIR RIGHT TO A NEW TRIAL.

#### B. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE ORDER GRANTING A NEW TRIAL AND JUDGMENT NOV.

**1. No clear departure from the accepted and usual course of judicial proceedings.**

**2. No conflict with any decisions of this Court or other Courts of Appeals.**

The decision of the Eleventh Circuit, which reflects a thorough examination of the record in this case, is correct. It applies well established legal principles and is not in conflict with any decision of this Court or any other Circuit Court of Appeals. The case presents no constitutional issues. In short, there are no special or important reasons that warrant further review. Accordingly, the Petition should be denied.

**The Procedural Issue**

POF and Deas expressly waived their right to a second trial in order to have an immediate appeal and review of the new trial order. They obtained this by the invited JNOV. 775 F.2d at 1503, 1508 (51a-53a, 64a, 65a). It is specious for them to argue (Petition, page 14) that they have been deprived of their constitutional right to a jury trial. That argument promotes an unjust procedure which, if accepted, would allow POF and Deas two trials and two

appeals despite their protestation that this would not be a piecemeal appeal because they did not wish to retry the case.

This case concerns erroneously admitted evidence and the erroneous refusal to give a proper jury charge, as to which the Eleventh Circuit ruled (775 F.2d 1506, 1508; 59a, 64a):

> We have ordered a new trial where "the charge given on burden of proof was in error and was prejudicial to the appellant." *Phillips v. State Farm Mutual Automobile Insurance Company,* 437 F.2d 365, 368 (5th Cir. 1971). In this case, the failure to instruct the jury on the burden of proof was prejudicial. Moreover, we have substantial doubts that the jury was completely guided during its deliberations. Thus, we hold that the district court did not abuse its discretion when it granted a new trial due to its failure to instruct the jury on the burden of proof under the Florida Act as set forth in *International Harvester.*
>
> * * *
>
> The district court did not abuse its discretion in granting a new trial. . . POF's evidence was speculative, both substantively and as to causation.

This case is distinguishable and not in conflict with either *Thomsen v. Cayser,* 243 U.S. 66 (1917), or *National Polymer Products, Inc. v. Borg-Warner Corp.,* 660 F.2d 171 (6th Cir. 1981).

In *Thomsen v. Cayser,* the plaintiff claimed a Sherman Act violation. At the first trial, a directed verdict was entered for the defendants based on the trial judge's finding that there was insufficient evidence to establish a com-

bination which was an unreasonable restraint of trade. The Court of Appeals (using a per se test) reversed the judgment and remanded the case for a new trial, holding that whether the restraint was reasonable or unreasonable was immaterial.

The case was retried, resulting in a verdict for the plaintiffs against certain defendants. On appeal for the second time, the Court of Appeals ordered a new trial under the rule of reason test. The plaintiffs waived their right to a new trial (in the Court of Appeals), and requested a rehearing to determine the sufficiency of their evidence. On rehearing, the Court of Appeals held that the evidence was insufficient to prove the combination was unreasonable and dismissed the complaint.

This Court reversed the decision and reinstated the trial court's judgment holding that the combination was per se unlawful, as it involved price fixing, and further that there was sufficient evidence to support the verdict. Therefore, *Thomsen* turned on a pure question of law regarding whether the per se or rule of reason test applied, and coincidentally on the sufficiency of the evidence under the proper test. Its holding does not conflict with the Eleventh Circuit's decision in this case because it is based upon essentially different facts and law.

In *National Polymer Products, Inc. v. Borg-Warner Corp.*, the initial new trial order was granted on the *sole* ground that the jury's verdict was against the clear weight of the evidence. Since this reason was a proper basis for both a new trial and a JNOV, the plaintiff requested that the court "correct" its order to grant both the new trial and JNOV and thereby permit an immediate appeal. On appeal, the Sixth Circuit reviewed the JNOV to determine whether there was subtantial evidence to support the jury's

verdict and found that there was, and reversed the JNOV. Then, the Sixth Circuit reviewed the new trial order to determine if it was an abuse of the trial court's discretion and held that it was not, and affirmed the new trial order.

In contrast to *National Polymer Products, Inc.*, the *PACCAR* new trial order was granted for legal reasons relating to the erroneous admission of evidence and an error in the jury instructions as well as reasons relating to the sufficiency of the evidence. These errors in the admission of evidence and jury instructions could only be corrected by a new trial order and could not serve as a basis for a JNOV, since a motion for JNOV tests only the legal sufficiency of the evidence to present a question for the jury. 5A, *Moore's Federal Practice,*¶ 50.03[2] (2nd ed. 1985); *See, Boeing Company v. Shipman,* 411 F.2d 365 (5th Cir. 1969) (*en banc*); *Continental Ore Co. v. Union Carbide and Carbon Co.*, 370 U.S. 690 (1962); *Montgomery Ward and Company v. Duncan,* 311 U.S. 243 (1940) (grounds for new trial).

The reasons for the new trial order and JNOV in this case distinguish it from *Thomsen* and *National Polymer Products, Inc.*

**Standard For Review of New Trial Order**

The authority to grant a new trial is confided almost entirely to the discretion of the trial court. *Montgomery Ward and Company v. Duncan,* 311 U.S. 243 (1940) (either errors in the admission of evidence or in jury instructions would be a proper basis for granting a new trial); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980); *McDonough Power Equipment, Inc. v. Greenwood,* 484 U.S. 548 (1984).

**The Discrimination Issue**

The District Court, in granting PACCAR's motion for a new trial, held that the evidence that PACCAR discriminated against POF was inherently speculative, and that POF's financial difficulties could not be attributed to this speculative discrimination. 775 F.2d at 1508 (1a-10a, 64a). Specifically, the District Court found that there was no factual basis for POF's claim of delivery time discrimination, which claim was based on its expert's non-random selection of dealers for comparison and unadjusted raw data, which in fact "showed that POF got their trucks faster than anybody else on an average" (8a). Similarly, the Eleventh Circuit, upon its independent examination of the record, held that the delivery time discrimination evidence was deficient because POF's expert selected dealers whom he thought received favored treatment; selected dealers whom were not demonstrated to have been similar to POF; and failed to restrict his selection to dealers located in the southeastern region of the United States. 775 F.2d at 1506 (60a). This was a non-objective and unreliable analysis by POF's expert and but one of several reasons why his testimony was held to have been inadmissible. *See,* Fed.R.Evid. 703. It is clear that the gist of the petitioners' grievance is that they disagree with both the Eleventh Circuit and District Court evaluations of the record, which by their Petition they seek a *de novo* review.

The Eleventh Circuit's decision is not in conflict with any of the Federal Dealers Act cases cited by POF and Deas. Indeed, the petitioners claim only that the decision "implicitly rejects" the dealer cases cited by them (Petition, page 8). Only one of the appellate court cases cited, *Jay Edwards, Inc. v. New England Toyota Distributors, Inc.,*

708 F.2d 814 (1st Cir.), *cert. denied*, 464 U.S. 894 (1983), dealt with alleged discrimination in allocation.[8]

*Jay Edwards, Inc.* is distinguishable because it was decided under the New Hampshire dealer law, which is significantly different from the federal statute. The failure to deliver "reasonable quantities" of vehicles (except for reasons beyond the manfuacturer's control) was itself a violation of the New Hampshire statute. *Jay Edwards, Inc.*, 708 F.2d at 817. Standing alone, this would not be a violation under the federal statute. *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir. 1967) ("the statute . . . does not afford Rambler a statutory right or formula for allocation or delivery of certain cars"); *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033 (5th Cir. 1981) (misallocation absent actual coercion does not establish a claim under the Dealers Act). Moreover, the appeal in *Jay Edwards, Inc.* was directed at the calculation of damages, not the finding of liability. *Jay Edwards, Inc.*, 708 F.2d at 818. The damage calculations in that case were also admitted at trial without

[8] *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978), dealt with termination for failure to meet sales quotas. *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F.Supp. 110 (E.D.N.Y. 1976), involved the denial of a motion for summary judgment in the trial court. *American Motor Sales Corp. v. Semke*, 384 F.2d 192 (10th Cir. 1967), involved the manufacturer's attempt to force the dealer to take unwanted models and its refusal to honor or credit the dealer with warranty work. In *Rea v. Ford Motor Co.*, 497 F.2d 577 (3rd Cir. 1974), Ford had threatened to cease shipping cars unless a separate corporation (in which the dealer Rea was a principal stockholder) resigned its Oldsmobile dealership in a neighboring town. *Shor-Line Rambler, Inc., v. American Motors Sales Corp.*, 543 F.2d 601 (7th Cir. 1976), involved a termination for alleged inadequate facilities and failure to meet sales goals. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971), involved a claim that the dealer was terminated for failing to reorganize under a Dealer Enterprise Plan which would have given the manufacturer control of the dealership.

objection. Thus, only the sufficiency of the evidence was at issue. In sharp contrast, POF's expert testimony and exhibits were introduced over vigorous objections by PACCAR. The District Court ultimately held this evidence to have been inadmissible.

Nor does the Eleventh Circuit's decision "effectively emasculate the Act" or "establish an impossible burden for plaintiffs." (Petition, page 8). The decision merely requires that, to prove discrimination in delivery time, the dealer must demonstrate an objective foundation for his analysis, i.e.; proof that the dealers selected for comparison are in fact comparable, and proof of a random selection of dealers for comparison. 775 F.2d at 1506, 1507 (60a-62a).[9]

Furthermore, with respect to alleged discriminatory allocation, the Eleventh Circuit did nothing more than follow the established and fair test set forth in *Cecil Corley Motor Company v. General Motors,* 380 F. Supp. 819 (M.D. Tenn. 1974) (The dealer must prove (1) that it actually ordered more vehicles than it received, (2) that particular model vehicles ordered, but not supplied, were available for delivery, i.e., there was no product shortage

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[9]Contrary to the argument at page 8 of the Petition, the Eleventh Circuit has not established an extra-statutory burden of proof under the Dealers Act in this case and in *Carroll Kenworth Truck Sales, Inc. v. Kenworth Truck Co.,*781 F.2d 1520 (11th Cir. 1986). Our own case involved a new trial on account of judicial error, and in *Carroll Kenworth,* the issue was whether the evidence was sufficient to support a jury verdict on a Dealers Act claim. *Compare, General Motors Acceptance Corporation v. Marlar,* 761 F.2d 1517 (11th Cir. 1985), wherein the Eleventh Circuit upheld a verdict for a dealer under the Dealers Act. The *Marlar* decision was subsequently vacated upon a joint motion of the parties. 774 F.2d 1042 (11th Cir. 1985).

at the time, or if there existed a period of product shortage, that the manufacturer failed to allocate vehicles in a fair and reasonable manner,[10] and (3) that the manufacturer failed to make such vehicles available for the reasonable requirements of the dealer's area of sales responsibility).

## CONCLUSION

For the foregoing reasons, PACCAR submits that no basis exists for granting the Petition For A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, and requests that the Petition be denied.

Respectfully submitted,

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March 26, 1986

[10]The Eleventh Circuit held that this second factor "had not been developed", and that "the absence of this critical evidence made it impossible for the jury to accurately determine whether Peterbilt had acted in bad faith." 775 F.2d at 1508 (63a).